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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

MAUREEN O'TOOLE,
Plaintiff and Appellant,

v.

REGENTS OF THE UNIVERSITY OF
CALIFORNIA

Defendant and Respondent.

A103693; A104969

(Alameda County
Super. Ct. No. 8107774)

This case arises out of the termination of plaintiff Maureen O'Toole from her position as coach of the women's water polo team at the Berkeley campus of the University of California (UC). O'Toole filed a wrongful discharge and discrimination action against the Regents of the University of California (Regents) and others.¹ After successfully trying the case on a breach of contract theory and being awarded damages, O'Toole filed a motion to set aside the judgment, asking the court to enforce a liquidated damages provision in the employment contract. The trial court denied the motion and O'Toole appealed. Thereafter, O'Toole filed a motion requesting attorney fees under Labor Code section 218.5, arguing that the damages awarded for breach of contract constituted unpaid wages under the statute's provision for attorney fees in actions for nonpayment of wages. The court denied the motion and O'Toole appealed. We

¹ Other defendants named in the complaint had been dismissed by the time of trial.

consolidated the two appeals for purposes of briefing, argument and decision, and we now affirm.

BACKGROUND

In 1995 John Kasser, athletic director at UC, hired O'Toole as head coach of the women's varsity water polo team. The terms of her employment were set out in written contracts and contract addenda providing for changes in salary and extensions of the term of the agreement. The last addendum extended the term of her contract to June 30, 2000. Women's water polo was an emerging sport that was subject to the rules of the National Collegiate Athletic Association (NCAA).²

O'Toole also coached a private "club team" in the off season. UC did not budget for or finance the club team. Club teams were supported by the participating students. Students on the club team paid for their own uniforms and travel and sometimes held fund raisers.

O'Toole's performance as a coach was good, but her immediate supervisor, Bob Driscoll, reported to Kasser that O'Toole struggled with issues of administrative compliance, bookkeeping procedures and processing of expenses. The first incident leading to her eventual termination involved a private checking account. In 1998 Kasser received a report from Driscoll about a checking account that O'Toole had opened, indicating that she was commingling her personal funds with UC funds. Kasser also received a written complaint from student athletes expressing concern that O'Toole had placed varsity team funds in a personal account and paid her personal expenses from the account. Kasser was concerned because he believed that O'Toole's activity constituted a misuse of state funds. He was also worried that O'Toole was losing the support of students and their parents.

Kasser placed O'Toole on paid administrative leave, based on the reasoning that when financial improprieties are at issue, the person involved should be deprived of

² At that time, the NCAA intended to add additional women's sports to the NCAA championships to meet federal requirements. As a particular sport developed and drew team participation in the country, it became known as an emerging sport that could become eligible for competition in NCAA championships within a couple of years.

access to UC finances. Kasser then turned the matter over to the UC internal auditors for a review of the account. Kasser met with O'Toole, who admitted she had made a mistake.

Todd Vizenor prepared the audit of O'Toole's checking account. He concluded that O'Toole's conduct amounted to a misuse of funds, but that UC's policies could have been better communicated to O'Toole. Vizenor reported that O'Toole had made cash payments to players in violation of NCAA rules. He concluded that O'Toole paid for personal expenses from the account in the amount of \$72,315.15. O'Toole had deposited personal funds to replace the misused funds in the account, but Vizenor concluded that a balance of \$14,158.79 was still owed to UC.

The second event that contributed to O'Toole's termination was Vizenor's discovery that UC had been charged for an extra airplane ticket for a team trip to Hawaii in 1997. He reported that an unused student ticket had been used by O'Toole's daughter. Student athletes who had been on that trip confirmed that O'Toole's daughter was present on the trip. O'Toole could not supply any documentation indicating that she had personally paid for the ticket.

The third event leading to O'Toole's departure from UC was a report that she allowed underage team members to consume alcohol after a tournament in Seattle in 1998.

After reviewing Vizenor's audit, Kasser asked for advice about appropriate disciplinary action and learned that in such cases, the offending employee is usually terminated. In August of 1998, Kasser met with O'Toole and delivered a letter stating that she would be terminated. Kasser gave her eight days to respond and offered her the option to resign. Kasser agreed that if O'Toole resigned, UC would corroborate her story that she resigned to pursue participation in the Olympics. Two or three days later, O'Toole agreed to resign.

After leaving UC, O'Toole received offers of employment from the University of California campuses at San Diego and Santa Barbara and Southwestern University. She turned them down, because they involved pay cuts, she was training for the Olympics and

she did not want to move with her young daughter. However, O'Toole and her daughter did move to Southern California, where O'Toole trained for the Olympics seven hours a day, six days a week for three years. She trained from the time she left UC until she participated in the September 2000 Olympics as a member of the women's water polo team.

In April of 1999, O'Toole filed discrimination charges with the Department of Fair Employment and Housing and received a right to sue letter. On November 16, 2001, she filed the second amended complaint in this action, alleging sex discrimination, wrongful discharge, breach of contract, breach of the covenant of good faith and fair dealing, infliction of emotional distress and defamation.³ The Regents' motion for summary adjudication was granted as to all causes of action except breach of contract and breach of the covenant of good faith. The matter proceeded to a court trial on those two causes of action.

At the trial, O'Toole explained the circumstances of the reasons given for her termination. She testified that she asked a lot of questions about how to do paperwork and arrange travel, but got few answers. Bob Driscoll, her immediate supervisor, did not know how the rules applied to emerging sports. He often promised to find the answers to her questions, but did not follow up.

O'Toole started the club team to give the students a chance to play throughout the year. Dues and fund raisers such as t-shirt sales financed the club team. She opened the personal checking account for the club team to keep those funds separate from the varsity team funds. The men's water polo coach told her that he used a similar club account. O'Toole testified that the fund raising t-shirt sales were not for the varsity team, but were for the club team. She paid for the manufacturing of the t-shirts with a check from the club account. When she explained that distinction to Vizenor, he maintained that the club team and the varsity team were the same.

³ We reinstated the complaint after it was dismissed for purported noncompliance with local "fast track" rules in A091968. (*O'Toole v. University of California, Berkeley et al.* (Apr. 12, 2001, A091968) [nonpub. opn.])

In January of 1998, Steve Doten, assistant coach of the women's water polo team, told O'Toole he felt uncomfortable with some of the entries in the checkbook for the outside account, and that he had been at a meeting discussing club accounts. O'Toole told him that if the account was a problem, she would close it. She closed the account and gave him all the statements. He examined the statements and told her it was a good idea to close it, and not to worry about it. O'Toole admitted she had commingled her personal funds and paid her personal obligations out of the club account.

O'Toole also admitted that students were drinking beer after a tournament in Seattle and that she did not tell them to stop. Later, after some players had complained, Driscoll told her it was not a good practice. Thereafter, O'Toole established a written team policy banning alcohol consumption.

O'Toole could not remember using a UC airplane ticket for her daughter for the team trip to Hawaii. She testified that if she had done so, she would have reimbursed UC.

In her trial brief and in argument to the court, O'Toole maintained that the Regents breached her employment contract by terminating her for conduct that did not rise to the level of a willful breach of duty as required by Labor Code section 2924. She argued that the damages from the breach were the salary due under the contract plus interest. Regarding the Regents' claim that she failed to mitigate the damages, O'Toole's counsel argued that the three other positions offered were not comparable in that they involved large salary cuts and a move out of the area. O'Toole expressly stated in her trial brief that she was not entitled to attorney fees because the written contract did not contain an attorney fee provision.

On February 7, 2003, the trial court filed its intended decision stating that based on "a bare preponderance of the evidence," the Regents did not have good cause to terminate O'Toole. The court found that the Regents did not breach the covenant of good faith and fair dealing. The court stated that O'Toole must take responsibility for poor judgment and questionable conduct, but that the applicable policies were not clear and the enforcement was not consistent.

Following issuance of the statement of decision, O'Toole objected only to the court's failure to award pre-judgment interest. The court agreed to award interest and directed O'Toole's counsel to prepare a judgment. The judgment was entered in accordance with the court's decision on May 7, 2003.

On May 20, 2003, O'Toole moved to set aside the judgment, arguing that the court made an error of law by failing to enforce a provision of the contract that provided for liquidated damages in the event of a termination without cause. O'Toole contended that the liquidated damages clause excused her duty to mitigate. At argument of the motion, O'Toole's counsel admitted that he had never raised the issue during the trial. In response to counsel's argument that the issue was clear, the court stated that if it had been clear, it would have been raised at trial or in the post-trial briefing relating to the notice of decision.

The court denied the motion on June 5, 2003, stating that the contract was ambiguous, no evidence on the issue had been presented at trial, and noting that the concept of estoppel might apply. The court ruled that the case had been tried on a different theory, and if there was any error, it was invited by O'Toole. O'Toole appealed from the judgment and the post-judgment order.

On August 14, 2003, O'Toole filed an application for attorney fees, arguing for the first time that Labor Code section 218.5 authorized an award of fees. This argument was based on her contention that the buy out provision of the contract provided for payment of wages, which authorized an award of fees. The court denied the application and O'Toole appealed.

DISCUSSION

On appeal, O'Toole argues that the trial court should have enforced the liquidated damages provision in her employment contract, which precludes any obligation to mitigate damages. She argues that the trial court erroneously denied her motion to vacate the judgment because she merely asserted an error of law. Relying on cases involving motion picture contracts, she argues for the first time that her contract contained a so called "pay or play" clause that entitled her to be paid for the duration of the contract

without regard to the duty to mitigate damages. She also contends that even if she had a duty to mitigate, the court employed an improper standard because her job offers were not substantially equivalent to the UC position. Finally, she argues that she is entitled to attorney fees under Labor Code section 218.5.

We have reviewed the relevant law and record on appeal, and finding no error in the trial court's rulings or judgment, we will affirm.

Denial of Motion to Vacate Judgment Not An Abuse of Discretion

O'Toole moved to set aside the judgment under Code of Civil Procedure section 663.⁴ "A motion to vacate under section 663 is a remedy to be used when a trial court draws incorrect conclusions of law or renders an erroneous judgment on the basis of uncontroverted evidence. The motion to vacate under section 663 is speedier and less expensive than an appeal, and is distinguished from a motion for a new trial, to be used when, e.g., the evidence is insufficient to support the findings or verdict." (*Simac Design, Inc. v. Alciati* (1979) 92 Cal.App.3d 146, 153.) As explained by Professor Witkin: "The statute permits the trial court to correct its own judicial error" (8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court, §147, p. 650.) The motion serves the narrow purpose of allowing correction of legal errors, and not the introduction of a totally new theory of the case except where the evidence in the record supporting the theory is undisputed. (*Hoffman-Haag v. Transamerica Ins. Co.* (1991) 1 Cal.App.4th 10, 15-16.)

The purported legal error that O'Toole seeks to correct is the trial court's offset for failure to mitigate against the damages assessed for breach of the employment contract.

⁴ Unless otherwise indicated, all statutory references are to the Code of Civil Procedure. Section 663 provides in relevant part: "A judgment or decree, when based upon a decision by the court . . . may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either of the following causes, materially affecting the substantial rights of the party and entitling the party to a different judgment: 1. Incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts"

O'Toole contends that paragraph 11, one of the four paragraphs in the employment contract concerning termination, excused her duty to mitigate damages.⁵

Paragraph 11 states: "In addition to and exclusive of the provision of paragraphs 3, 8, 9, and 10 of this Employment Contract, there is also reserved to the University the right to terminate this Employment Contract without cause at any time. The parties hereto agree that in the event this right to terminate is exercised, the University will pay salary to Coach in monthly installments as defined in the Contract Addendum." The paragraph limits the payment due to base salary and excludes any other benefits. The paragraph concludes that termination may: "cause Coach to lose certain benefits, supplemental compensation or outside compensation . . . which damages are difficult to determine with certainty. Similarly, the parties recognize that Coach has the duty to obtain other employment in mitigation of any damages she may sustain by virtue of the termination of this Employment Contract. Accordingly, the parties agree to this liquidated damages provision."

Reliance on the clause that concerned termination without cause and its liquidated damages provision was first asserted after the trial, the post-trial motions and argument regarding the statement of decision, and after the judgment was entered. Counsel's only explanation for his late change of theory was that the issues were not fresh in his mind when he read the statement of decision and he did not see the new theory until after judgment was entered.

We review a trial court's decision on a motion to vacate the judgment under an abuse of discretion standard. A trial court's decision refusing to vacate a judgment will be upheld if any applicable ground supports it. (*Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian* (1990) 218 Cal.App.3d 1058, 1076-1077.) Here, the trial court noted the failure to rely on the liquidated damages provision of paragraph 11 and questioned whether principles of estoppel should apply, stating: "[On a] very practical level, the case was tried on a particular theory." The court expressed concern that if

⁵ Two paragraphs concerned a coach's inability to perform the job and mutual agreement to terminate and are not relevant here.

paragraph 11 were in issue, extrinsic evidence might be necessary to construe its meaning. The court noted that the employment contract was not “an ideal work of draftsmanship.” The court ruled that even if the motion to vacate was technically the proper manner in which to raise the point, the error if any, was invited by O’Toole.

On appeal, O’Toole maintains that she merely seeks to raise an issue of law, involving the interpretation of a clear contract term. But the invocation of paragraph 11 involves more than a mere correction of legal error. It opens a whole new and questionable legal theory that the Regents did not breach the contract and O’Toole was not terminated for cause under paragraph 8, but without cause under paragraph 11. Because this theory was not raised at trial, the evidence in the record does not support it.

When asked at trial if he terminated O’Toole under the buy out provisions of paragraph 11, Kasser replied, “No. It was for cause,” and referred to paragraph 8.⁶ O’Toole appears to be arguing that in a breach of contract action, when an employee is terminated for cause, but cause is not proven at a subsequent trial, the termination is converted to a no cause termination under the contract and the buy out provisions are activated. She has cited no authority for this argument.

“While parties have a right to insist that damages shall be measured by a recognized legal standard, error cannot always be predicated upon failure to do so. There is no rule of practice which precludes them from trying the question of damages on any theory they see fit. . . . When they do adopt such a rule they are bound by it, and neither one will be subsequently permitted to question his own conduct relative to it.” (*Durkee v. Chino Land and Water Co.* (1907) 151 Cal. 561, 569-570.) O’Toole did not try the case on a theory of specific enforcement of paragraph 11. She tried the case as a breach of contract action. Damages for a breach of contract include “the amount which will

⁶ Paragraph 8, under the heading “Termination,” provided: “Violation by Coach of the provisions hereinabove stated [concerning UC, NCAA and Pac-10 policies], violation of NCAA regulations, misconduct or failure to maintain appropriate standards of performance, shall constitute a breach of this Employment Contract and upon such breach the University may, at its discretion, administer disciplinary or corrective action or terminate this Employment Contract. Upon such termination, any and all future rights and obligations of the parties hereto and hereunder thereupon shall cease.”

compensate the party aggrieved for all the detriment proximately caused thereby” (Civ. Code § 3300.) Breach of contract damages were what O’Toole sought and what she was awarded. It is significant that paragraph 11 states that it is “[i]n addition to and exclusive of,” the other paragraphs concerning termination. Paragraph 8 regarding termination for cause did not contain a liquidated damages provision. Neither did it provide that if a court determined that cause for termination was not established, the parties agreed to a buy out at the full contract price. Similarly, the other two paragraphs concerning termination carried no liquidated damages provision. Only paragraph 11, the clause governing termination without cause contained the liquidated damages provision.

O’Toole never contended she was entitled to liquidated damages and never based her case on paragraph 11. The trial court properly exercised its discretion not to vacate the judgment and reopen the proceedings to an entirely new theory. No abuse of that discretion is shown, and we affirm the court’s order.

Paragraph 11 Is Not A “Pay or Play” Clause

Relying primarily on *Lynch et al. v. CIBY 2000 et al.* (Aug. 13, 1998, No. CV 97-9022 SVW (RZX)) Lexis 23496 (*Lynch*), an apparently unpublished federal district court ruling on a motion for summary judgment, O’Toole argues that paragraph 11 is similar to the so-called “pay or play” provisions in motion picture contracts. The *Lynch* case involved a contract with director David Lynch to provide his exclusive services for the production of three motion pictures over a period of seven years. The agreement gave the defendant the option to elect not to produce any of the films and merely pay Lynch a guaranteed fixed compensation. The court held that such provisions are not subject to a duty to mitigate where the contract guarantees compensation even if the employee does not provide services.

Lynch concerned a contract term that provided a guaranteed minimum compensation if the employer opted not to go through with the project. It was an action to enforce a specific contractual provision to pay a guaranteed fixed compensation. The *Lynch* court relied on *Payne v. Pathe Studios, Inc.* (1935) 6 Cal.App.2d 136 (*Payne*) and *Garfein v. Garfein* (1971) 16 Cal.App.3d 155 (*Garfein*), to explain that a “pay or play”

clause is not a liquidated damages clause. Such clauses offer the option to “pay” or “play,” with either choice being performance, rather than a breach of the contract. (*Payne, supra*, 6 Cal.App.2d at pp. 141-142; *Garfein supra*, 16 Cal.App.3d at p. 159.) *Lynch* and the cases it relied on have no relevance here.

No Improper Standard Of Mitigation

O’Toole argues that the trial court erred in issuing a credit for her failure to mitigate because the job offers she received were for less salary, required moving out of the area, and were not substantially similar to her employment at UC. Simply stated, the trial court found that O’Toole’s reasons for rejecting the job offers were “not entirely credible.” The court’s decision on O’Toole’s failure to mitigate is supported by the evidence that she in fact relocated to Southern California, and from the time she left UC until beyond the end of her contract term, she trained for the Olympics seven hours a day, six days a week for three years. O’Toole’s own testimony supports the court’s conclusion that O’Toole’s election to pursue her Olympic training activity precluded her acceptance of other coaching positions.

Labor Code section 218.5 Is Inapplicable

After the judgment was entered, approximately two months after the motion to vacate was denied, and after O’Toole’s counsel had conceded in her objections to the proposed statement of decision that attorney fees were not recoverable, O’Toole filed a motion for attorney fees under Labor Code section 218.5. That code section provides in relevant part: “In any action brought for the nonpayment of wages . . . the court shall award reasonable attorney’s fees and costs to the prevailing party if any party to the action requests attorney’s fees and costs upon the initiation of the action.” O’Toole’s complaint was not for unpaid wages. She did not request attorney fees under this code section at the initiation of the action. Her complaint for discrimination and wrongful discharge specifically requested attorney fees and costs “pursuant to the California Fair Employment and Housing Act and other applicable statutes.” The Fair Employment and Housing Act causes of action were dismissed prior to trial. O’Toole prevailed only on her breach of contract claim and was awarded contract damages.

O'Toole's own argument demonstrates the inapplicability of Labor Code section 218.5. She relies on definitions in Labor Code sections 200 and 201 that characterize "wages" as "all amounts for labor performed by employees" and provide that "wages earned and unpaid at the time of discharge are due and payable immediately. . . ." Damages for breach of contract do not fall within the Labor Code's definition of wages, as those funds were not compensation for labor performed, nor were they earned and unpaid at the time of discharge. She had performed no labor for which wages were due at the time of termination.

She argues that paragraph 11 of the employment contract referred to guaranteed compensation, which is a variation of her argument that the clause is a "pay or play" clause. Paragraph 11 is characterized in the contract as a liquidated damages clause and not a guaranteed wage payment. We see no reason to construe it otherwise.

O'Toole argues that the term "wages" includes other benefits of employment such as guaranteed severance pay, but she produced no evidence of the value of any fringe benefits or of any agreement for severance pay that was not honored. When O'Toole was placed on administrative leave, she was paid her salary. The real basis for her belated claim for attorney fees is her unsupportable contention that the liquidated damages clause in paragraph 11 is actually a guaranteed salary payment that became due on termination. As discussed above, the liquidated damages clause is not a "pay or play" provision and does not involve unpaid wages.

No wages were unpaid at the time of O'Toole's termination. Neither party requested attorney fees for an unpaid wage claim at commencement of the action. The trial court correctly denied O'Toole's motion for attorney fees.

CONCLUSION

The case was tried, and won, on a breach of contract theory. The trial court did not abuse its discretion in denying O'Toole's post-trial motions. The judgment and orders appealed from are affirmed.

Marchiano, P.J.

We concur:

Stein, J.

Swager, J.